84-743

No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1984

BETTY A. ROSEN,

Petitioner,

vs.

CHRYSLER PLASTIC PRODUCTS CORP., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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SUBJECT INDEX

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Petitioner, Betty A. Rosen, respectfully prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Sixth Circuit rendered in these proceedings on August 8, 1984.

QUESTIONS PRESENTED

1. Whether the payment of "red-circle rates" to a male employee for a period of nearly a decade, coupled with the fact that such "red-circling" may and, in all likelihood, will continue until the male employee's work life ends, constitutes a permissible justification under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., for paying and continuing to pay a female employee performing substantially equal work in the same department a lesser wage.

2. Whether "red-circle rates", which serve no remedial purpose, foster a result in conflict with Title VII or the Equal Pay Act, or result in a permanent perpetuation of unequal wages for equal work, are legally permissible.

TABLE OF AUTHORITIES

Cases

Statutes

Federal Statutes:

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Ohio, Western Division, has not been reported and is printed as Appendix A hereto. The opinion of the United States Court of Appeals for the Sixth Circuit has not been reported and is printed as Appendix B hereto.

JURISDICTION

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in the case of Betty A. Rosen v. Chrysler Plastic Products Corporation and United Auto Workers Local 1879, Case No. 83-3273, entered August 8, 1984. That judgment affirmed the judgment of the United States District Court for the Northern District of Ohio,

Western Division, entered March 28, 1983, denying petitioner's motion for summary judgment and granting respondents' motions for summary judgment. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES AND REGULATIONS INVOLVED

29 U.S.C. Section 206(d)(1)-(2):

> (d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential

based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

42 U.S.C. Section 2000e-2(a)(1):

(a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

42 U.S.C. Section 2000e-2(c)(3):

(c) It shall be an unlawful employment practice for a labor organization--

* * *

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. Section 2000e-2(h):

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the

basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

29 C.F.R. Section 800.146-.147:

§800.146 Examples--"red circle" rates, in general.

The term "red circle" rates describes certain unusual, higher than normal, wage rates which are maintained for many reasons. An example of the use of a "red circle" rate might arise in a situation where a company wishes to transfer a long service male employee, who can no longer perform his regular job because of ill health, to different work which is now being performed by women. Under the "red circle" principle the employer may continue to pay the male employee his present salary, which is greater than that paid to the women employees for the work both will be doing. Under such circumstances, maintaining an employee's established wage rate, despite a reassignment to a less demanding job is a valid reason for the differential even though other employees performing the less demanding work would be paid at a lower rate, since the differential is

based on a factor other than sex. However, where wage rate differentials have been or are being paid on the basis of sex to employees performing equal work, rates of the higher paid employees may not be "red circled" in order to comply with the Act. To allow this would only continue the inequities which the Act was intended to cure.

§800.147 Examples--temporary reassignments.

For a variety of reasons an employer may require an employee, for a short period, to perform the work of a job classification other than the employee's regular classification. If the employee's rate for his regular job is higher than the rate usually paid for the work to which he is temporarily reassigned, the employer may continue to pay him the higher rate, under the "red circle" principle. For instance, an employer who must reduce help in a skilled job may transfer employees to less demanding work without reducing their pay, in order to have them available when they are again needed for their former jobs. Although employees traditionally engaged in performing the less demanding work would be paid at a lower rate than those employees

transferred from the more skilled jobs; the resultant wage differential would not constitute a violation of the equal pay provisions since the differential is based on factors other than sex. This would be true during the period of time for which the "red circle" rate is bona fide. (See §800.146) Temporary reassignments may also involve the opposite relationship of wage rates. Thus, an employee may be required, during the period of temporary reassignment, to perform work for which employees of the opposite sex are paid a higher wage rate than that paid for the duties of the employee's regular job classification. In such a situation, the employer may continue to pay the reassigned employee at the lower rate, if the rate is not based on quality or quantity of production, and if the reassignment is in fact a temporary one. If a piece rate is paid employees of the opposite sex who perform the work to which the employee in question is reassigned, failure to pay that employee the same piece rate paid such other employees would raise questions of discrimination based on sex. Also, failure to pay the higher rate to the reassigned employee after it becomes known that the reassignment will not be of a temporary nature would raise a

> question whether sex rather than the temporary nature of the assignment is the real basis for the wage differential. Generally, failure to pay the higher rate for a period longer than one month will raise questions as to whether the reassignment was in fact intended to be a temporary one.

STATEMENT OF THE CASE

Petitioner, Betty A. Rosen, and her male counterpart, Gary A. Dunn, have been employed by Chrysler since 1968, at which time Rosen earned more than Dunn. Between early 1971 and late 1972, while Rosen's wage remained unchanged, Dunn was given a series of "progression" increases. By May, 1973, Dunn was earning 10% more than Rosen in a grade 9 classification as opposed to Rosen's grade 7.

Since 1973, although Rosen has consistently been paid less than Dunn, Rosen and Dunn have performed virtually

identical work involving equal skill, effort, and responsibility. In 1977, Dunn and Rosen were placed in a grade 8 classification yet Dunn continues, despite the fact he performs work identical to Rosen, to earn a grade 9 wage. This result has been accomplished, over Rosen's objections, through Union/Chrysler agreements, beginning in 1974, to permanently "red-circle" the wage differential between Rosen and Dunn. Between 1973 and June, 1982, Dunn earned $7,586.84 more than Rosen. He will continue to earn more than Rosen so long as he holds his job.

Following the filing of an EEOC charge and the issuance of a probable cause determination in her favor and a right-to-sue letter, Rosen timely filed her Title VII claim in district court. On March 28, 1983, the court held the

"red-circle" rate paid to Dunn permissible under 29 U.S.C. Section 206(d)(1)(iv) and granted defendants summary judgment. On August 8, 1984, the United States Court of Appeals for the Sixth Circuit affirmed the district court's opinion.

BASIS FOR FEDERAL JURISDICTION

Federal jurisdiction in the court of first instance was based on 28 U.S.C. Section 1331 and 42 U.S.C. Section 2000e-5.

ARGUMENT

42 U.S.C. §2000e-2(a)(1) prohibits an employer from discriminating against any individual with respect to compensation because of such individual's sex. 42 U.S.C. §2000e-2(c)(3) prohibits labor organizations from causing or attempting

to cause an employer to discriminate against an individual in violation of §2000e-2.

Title VII incorporates the defenses available under the Fair Labor Standards Act, as amended, 29 U.S.C. §206(d), commonly known as the Equal Pay Act of 1963. Defendants asserted in the courts below that the wage differential between Rosen and Dunn was, is, and will be permissible under 42 U.S.C. §2000e-2(h) and 29 U.S.C. §206(d)(1) since it is based on a "factor other than sex". Defendants had the burden of proof on this issue. Corning Glassworks v. Brennan, 417 U.S. 188, 196-197, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974); cf. 29 C.F.R. §800.141. Defendants alleged the pay disparity between Rosen and Dunn was permissible because Dunn's wage rate had been "red-circled".

The "red-circling" concept is one of first impression for this Honorable Court and, in light of the opinions rendered by the courts below, a concept sorely in need of judicial interpretation and guidance.

A "red-circle" wage rate has been generally defined as:

> * * * a higher rate paid to a particular employee when he is transferred to a job at a lower skill or rate of pay than his former job, either on a temporary basis, to keep him available when he is again needed in his regular, higher paid job, or to avoid hardship when an employee who has served long and faithfully has, by reason of age or illness, become unable longer to perform his regular job." (Emphasis added.) Hodgson v. Goodyear Tire and Rubber Co., 358 F.Supp. 198 (N.D. Ohio W.D. 1973); see 29 C.F.R. §§800.146-.147 and Pettway v. American Pipe Co., 576 F.2d 1157 (5th Cir. 1978).

The Fifth Circuit Court of Appeals has deemed "red-circling" a Title VII

remedial device, utilized when the transfer of discriminatees to jobs located in lines of progression in a new department previously closed to them would involve a temporary sacrifice in wages. The Fifth Circuit has permitted "red-circling" until the discriminatee has the opportunity to progress to the new job he or she would have held but for the past discrimination. At that point, the "red-circling" ends. Watkins v. Scott Paper Co., 530 F.2d 1173 (5th Cir. 1976), cert. denied 429 U.S. 861, 97 S.Ct. 163, 50 L.Ed.2d 139; Swint v. Pullman Standard, 539 F.2d 77 (5th Cir. 1976); Stevenson v. International Paper Co., 516 F.2d 103 (5th Cir. 1975). For a typical "red-circling" order, see United States v. Inspiration Consolidated Copper Co., 6 CCH E.P.D. para. 8918 (D. Ariz. 1973). Accord, United States v. Bethlehem Steel

Corp., 446 F.2d 652 (2nd Cir. 1971); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), cert. dismissed 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655; Clark v. American Marine Corp., 304 F.Supp. 603 (D. La. 1969); United States v. United Papermakers & Paperworkers, etc., 301 F.Supp. 906 (D. La. 1969), affirmed 416 F.2d 980 (5th Cir. 1969), cert. denied 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100; United States v. Lee Way Motor Freight, Inc., 7 CCH E.P.D. para. 9066, 9067 (D. Okla. 1973).

In this case, it is undisputed that the "red-circling" of Dunn's wage was and is not temporary and that he was not "red-circled" because age or illness prevented him from doing his regular job. Dunn, in fact, continues to perform the same job--a job equal to Rosen's--he did before he was "red-circled". The "red-

circling" of his job has persisted for over a decade and, according to defendants, will continue until Dunn retires.

Defendants argued below that the failure to "red-circle" Dunn's wage rate might have a negative effect on him. Defendants and the lower courts neglected to consider the devastating impact of such a discriminatory practice on Betty Rosen, who, for over 10 years, has performed equal work side-by-side a male, whom she trained, who, throughout that 10 year period, earned more than she did. As a result of the decisions of the courts below, Betty Rosen is a woman faced with the certainty she will continue to receive a wage inferior to Dunn's until he retires. The "red-circling" of Dunn's wage rate amounts to the permanent payment of an unequal wage for equal work.

The scope of the "red-circling" defense in Title VII and Equal Pay Act cases is sorely in need of definition. The purpose and limits of "red-circling" need clarification to prevent a misapplication of the concept so severe as to cause a permanent perpetuation of prior discrimination in the payment of wages. "Red-circling" should not be permitted when it serves no remedial purpose, when it fosters a result in conflict with Title VII or the Equal Pay Act, or when its result is a permanent perpetuation of unequal wages for equal work.

This case presents this Honorable Court with its first opportunity to consider the "red-circling" concept, to address and approve the proper uses of "red-circling", and to denounce and reject those circumstances under which this normally laudable, remedial concept

can be perverted so as to perpetuate the payment of unequal wages for equal work and to frustrate the goals of Title VII and the Equal Pay Act. The many thousands of employees who are the victims of improper and illegal "red-circling" anxiously await a pronouncement from this Honorable Court in the unsettled area of the law.

For these reasons, petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX A

Opinion and Order of the District Court

(Filed March 28, 1983)

Case No. C79-93

IN THE UNITED STATES DISTRICT COURT
For The Northern District of Ohio
Western Division

BETTY A. ROSEN,

Plaintiff,

vs.

CHRYSLER PLASTIC PRODUCTS CORP., et al.,

Defendants.

OPINION AND ORDER

POTTER, J.:

This cause came to be heard on cross-motions for summary judgment by the plaintiff and defendant Chrysler Plastic Products Corporation (hereafter Chrysler) and defendant United Automobile, Aerospace and Agricultural Implement Workers

of America, UAW, Local 1879 (hereafter Union). This cause was submitted to the Court on the pleadings, memoranda, affidavits, depositions, answers to interrogatories and oral arguments of counsel.

The plaintiff, Betty A. Rosen, filed the present action pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq. She alleges that the defendants, Chrysler and Union, discriminated against her on the basis of sex by consenting to the payment of, and actually paying, greater wages to a male Chrysler employee and Union member, from 1973 through the present, although she performed substantially equal work in the same department, the performance of which involved equal or greater skill, effort and responsibility. The plaintiff seeks back pay equal to that earned by her male counterpart, wage

equalization with the male, reasonable attorney fees and costs.

The following relevant facts are undisputed. The plaintiff is, and at all times relevant was, an employee of the Chrysler Plastic Products Corporation at the Sandusky, Ohio plant. She was originally hired to work at the plant in September, 1965 as a color matcher in the Production Department when it was owned by Airco Company. Shortly after Chrysler's acquisition in 1968, the plaintiff was transferred to the Styling Department. By late 1972, she had the grade 7 job classification of Technician-Test and Analysis.

Gary B. Dunn joined Chrysler's predecessor in 1966 and transferred into the Styling Department in 1967. By late 1972, Dunn was a grade 9 Illustrator-Graphics.

In 1973, the first year for which the plaintiff is attempting to assert a claim for wages, the plaintiff was in the classification of Technician-Test and Analysis at grade 7, and Mr. Dunn was in the classification of Illustrator-Graphic B at grade 9.

On January 2, 1974, the National Labor Relations Board issued a "certification of representative" for a salaried collective bargaining unit of certain salaried employees at the Sandusky plant. The plaintiff and Mr. Dunn were, and are, employees within that unit and the defendant Union became, and is, their collective bargaining agent. During 1974, collective bargaining negotiations began for the first collective bargaining agreement between the Union and Chrysler. During the negotiations it was agreed that any employee, whether male or

female, who was determined to be receiving an improperly high rate of pay as a result of misclassification should be "red-circled" so that such an employee, whether male or female, would not take a pay reduction. Thirteen employees, ten male and three female, were "red-circled."

Later in 1974, the first collective bargaining agreement between the Union and Chrysler was negotiated. The agreement was dated December 9, 1974 and its approximate three-year term, subject to its other provisions, extended until November 23, 1977. Under the 1974-1977 agreement, the pay was basically determined by classification, grade and corresponding salary range. Under these provisions of the agreement, variances between salaries of employees performing the same work were possible because each

classification had a substantial salary range through which an employee may advance by automatic progression increases as well as by performance increases.

The 1974-1977 agreement contained a provision relevant to transfers which provided, in part:

> An employee transferred within a plant or office in the same bargaining unit will be transferred in accordance with the following provisions:
>
> * * *
>
> (3) To a lower grade. An employee transferred from one grade to a lower grade will be transferred:
>
> a. At the same salary if his current salary is one of the automatic progression steps, is between progression steps of the lower grade, or falls within the merit range of the lower grade.
>
> b. To the maximum salary of the lower if his current salary exceeds the maximum.
>
> c. An employee who is transferred to a higher grade than any grade previously held and who within six (6) months of such transfer is transferred again to the grade from which

> he was promoted due to the employee's inability to satisfactorily perform the work of the higher grade shall, upon transfer to such lower grade, receive the same salary he received in the lower grade immediately prior to his promotion. If the employee is eligible for additional progression increases, upon transfer to the lower grade, the time spent in the higher grade will be credited toward completion of the required credited time in the lower grade.
>
> If a transfer from a higher grade to a lower grade is made, a new progression period begins effective with date of transfer. However, when an employee is transferred to a higher grade and subsequently transferred to his former grade, except as provided in 3(c) of this section, he shall receive a salary determined in accordance with Paragraphs 3(a) or (b) of this section, or shall return to the position in the salary range he would have otherwise attained through automatic progression had he not been transferred, whichever results in a higher salary.

During the first month under the collective bargaining agreement, the plaintiff, classified as a Technician-

Test and Analysis at grade 7, received $208.35 per week. Gary Dunn, "red-circled" at the wage rate for Illustrator-Graphic B, grade 9, received $224.26 per week. Thereafter, both the plaintiff and Mr. Dunn received general increases in the same dollar amount and merit increases pursuant to the collective bargaining agreement.

In 1977, the second collective bargaining agreement between the Union and Chrysler was negotiated. It was dated December 8, 1977, and its approximate three-year term, subject to its other provisions, extended until November 23, 1980. Under the 1977-1980 agreement, the pay of an employee was again basically determined by classification, grade, and corresponding salary range. This agreement also contained provisions to protect both male employees and female employees

from wage reductions in situations such as that presented here.

On December 19, 1977, and also as a result of the 1977 negotiations, the plaintiff was changed from the classification of Technician-Test and Analysis at grade 7 to the new classification of Color Specialist-Styling at grade 8, and Mr. Dunn was changed from the classification of Illustrator-Graphic B at grade 9 to the new classification of Color Specialist-Styling at grade 8, which were the same classification and grade as the plaintiff's were. At the time, the plaintiff's rate was increased from $266.90 to $273.95 and Mr. Dunn's rate remained at $290.83. Thereafter, both the plaintiff and Mr. Dunn received general wage increases and cost of living in the same dollar amount pursuant to the collective bargaining agreement.

In 1980, the third collective bargaining agreement between the Union and Chrysler was negotiated. It was dated October 16, 1980, and its approximate three-year term, subject to its other provisions, extends until November 23, 1983. Under the 1980-1983 agreement, the pay of an employee was again basically determined by classification, grade and corresponding salary range. This agreement also contained provisions to protect both male employees and female employees from wage reductions in situations such as that presented here.

In this action, the plaintiff seeks the wage differential between her and Mr. Dunn from 1973 through the present time.

The defendants have opposed the plaintiff's motion for summary judgment, asserting that there is a question of

fact as to whether the plaintiff and Mr. Dunn performed equal work within the permissible time period under Title VII. At oral argument, the plaintiff conceded that this is a question of fact which precludes granting her motion for summary judgment but requested that the Court consider her motion as one for partial summary judgment as to the issue of whether the "red-circling" in this instance is based on sex or is sexually discriminatory in impact.

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin....

42 U.S.C. §2000e-2(a). The last sentence of Section 703(h) of Title VII, known as the Bennett Amendment, further provides as follows:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

42 U.S.C. §2000e-2(h). The Supreme Court has held that the Bennett Amendment incorporates the four affirmative defenses of the Equal Pay Act of 1963, 29 U.S.C. §206(d)(1)(i)-(iv), into Title VII for sex-based wage discrimination claims. County of Washington v. Gunther, 452 U.S. 161 (1981).

The Equal Pay Act of 1963, 29 U.S.C. §§206 et seq., provides, in part, as follows:

> (d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of the subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. §206(d)(1).

In opposition to the plaintiff's motion for summary judgment and in support of their motions for summary

judgment, the defendants assert that the wage differential between the plaintiff and Mr. Dunn was made pursuant to a "factor other than sex" which is permissible under 29 U.S.C. §206(d)(1).

For the limited purpose of their motions for summary judgment, the defendants assume that the jobs performed by the plaintiff and Gary Dunn from 1973 to the present were equal within the meaning of Title VII of the Civil Rights Act of 1964.

It is uncontested that the plaintiff was paid less than Mr. Dunn from 1973 through the present time. Affidavit of Chester R. Ferguson, p. 4. The defendants have the burden of proving that the disparity in pay was based on some factor other than sex. Corning Glassworks v. Brennan, 417 U.S. 188, 196-197; Odomes v.

Nucare, Inc., 653 F.2d 246, 251 (6th Cir. 1981).

The defendants assert that initial variances in wages paid the plaintiff and Mr. Dunn were the result of a factor other than sex, and therefore the "red-circling" agreement perpetuated no prior unlawful bias. The congressional history supports "red-circling" as a valid defense:

> Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded. It also recognizes certain special circumstances, such as "red circle rates."

> This term is borrowed from War Labor Board parlance and describes certain unusual, higher than normal wage rates which are maintained for many valid reasons. For instance, it is not uncommon for an employer who must reduce help in a skilled job to transfer employees to other less demanding jobs but to continue to pay them a premium rate in order to have them available when they are again needed for their former jobs.

H.R. No. 309, 88th Cong., 1st Sess. 3, reprinted in [1963] U.S. Code Cong. & Admin. News, 687, 689.

The United States Department of Labor, in interpreting the phrase "factor other than sex" has approved the principle of "red-circling" as follows:

> The term "red-circle" rates describes certain unusual, higher than normal, wage rates which are maintained for many reasons. An example of the use of a "red-circle" rate might arise in a situation where a company wishes to transfer a long-service male employee, who can no longer perform his regular job because of ill health, to different work which is now

> being performed by women. Under the "red-circle" principle the employer may continue to pay the male employee his present salary, which is greater than that paid to the women employees for the work both will be doing. Under such circumstances, maintaining an employee's established wage rate, despite a reassignment to a less demanding job is a valid reason for the differential even though other employees performing the less demanding work would be paid at a lower rate, since the differential is based on a factor other than sex. However, where wage rate differentials have been or are being paid on the basis of sex to employees performing equal work, rates of the higher paid employees may not be "red-circled" in order to comply with the Act. To allow this would only continue the inequities which the Act was intended to cure.

29 C.F.R. §800.146 (1982), and:

> For a variety of reasons an employer may require an employee, for a short period, to perform the work of a job classification other than the employee's regular classification. If the employee's rate for his regular job is higher than the rate usually paid for the work to which he is

> temporarily reassigned, the employer may continue to pay him the higher rate, under the "red-circle" principle. For instance, an employer who must reduce help in a skilled job may transfer employees to less demanding work without reducing their pay, in order to have them available when they are again needed for their former jobs. Although employees traditionally engaged in performing the less demanding work would be paid at a lower rate than those employees transferred from the more skilled jobs; the resultant wage differential would not constitute a violation of the equal pay provisions since the differential is based on factors other than sex. This would be true during the period of time for which the "red-circle" rate is bona fide.

29 C.F.R. §800.147 (1982).

The principle of "red circling" has also been recognized by the courts as a permissible factor other than sex. In Mangiapane v. Adams, 20 F.E.P. Cases 699 (D.D.C. 1979), on facts similar to those in the present action, the court held that "red-circling" was a factor other

than sex within the meaning of the Equal Pay Act. In Mangiapane a review of various civil service classifications disclosed that the position in dispute could not be sustained at its former grade level. The civil service employer redesignated the position to a lower grade but retained the eleven persons holding the position, nine men and two women, at their former grade level to lessen the adverse impact on those individuals. The court upheld the employer's decision against a challenge by a female employee assigned to the position in dispute. The court held that "the decision . . . to perpetuate the salary differential . . . was not based upon considerations of sex. The agency merely sought to mitigate the impact of a potentially demoralizing adjustment in job classifications. Nor was the decision sexually discriminatory

in its impact." Mangiapane, supra, at 701.

In Marshall v. Hudson Co., 23 W.H. Cases 1327 (E.D. Mich. 1979) the court states: "The 'red circle' principle operates to permit, in extraordinary instances and on an ad hoc basis, the maintaining of disparate wage-rates with respect to workers of different sexes performing essentially equal work, notwithstanding the proscriptions contained in the Act." Id. at 1332.

The initial question to be determined in the present action is whether the disparate wage rate at the time Mr. Dunn was "red-circled" resulted from a sexual bias or from factors other than sex. The evidence submitted in this case is clear that Mr. Dunn and the plaintiff were performing different duties at least until 1974 or 1975.

In her deposition Mrs. Rosen stated that she and Mr. Dunn were doing different work until 1974 or 1975. Rosen deposition, 29-30. She stated that when she first went into the styling department she did color matching, Mr. Dunn did work on the drawing board, and that he continued doing work on the drawing board until 1974 or 1975. Id. at 29-30.

In his deposition, Gary Dunn stated that he joined the styling department at Airco in 1967. Dunn Deposition, 5-6. He stated that in 1968, when Chrysler took over the Airco plant, he was "on the board":

> It was my job to create graphic designs, geometric designs that we could use on vinyl. It was also my job to make signs in the plant, to help with setting up designing displays for the styling department. In that time I think I probably made around 400 designs for the plant.

Q. In what time now are you referring to, from '68 to the present time?

A. No, from '68 to, let's see--actually it went back to '67 when I went in before Chrysler took it over. When Chrysler bought the designs that were already made, more or less, some of them they didn't use. Okay, this goes up to '71 and the actual design was taken out of that job.

Q. What did you do from '71 on?

A. Okay, from '71 on, I got mixed up in a whole bunch of things that this new boss, Neil Brown, brought in with him. He wanted to buy the designs from other people, customers more or less or suppliers from different engraving houses, whatever. An so I did at that time a partial designer's work; I did the designs, I laid out some overlays for silkscreens; I did touch-up work on positive or negative, since we have a photographic facility there; and then I also helped the man that was in charge of all the silkscreening, that was Mr. Bill Matt. And I did color development work too.

Dunn deposition, 7-8.

Dieter Hoyer, product design supervisor at Chrysler, testified that the duties of the plaintiff and Mr. Dunn were different in 1975 and were different until 1981. Hoyer deposition, 14-17.

The defendants have admitted, for purposes of their motions for summary judgment only, that the plaintiff and Mr. Dunn have performed the same duties from 1973 to the present.

The Court finds that the wage differential between the plaintiff and Mr. Dunn as of May, 1973, was due to a factor other than sex. It is undisputed that until sometime in 1971 Mr. Dunn worked on the drawing board, a task that the plaintiff never performed. It is also undisputed that at least until May, 1973, Mr. Dunn performed some work on the drawing board, as well as other tasks, which the plaintiff did not do. Because

Mr. Dunn performed these tasks he was classified in a job title which put him in a higher salary grade than the plaintiff. Therefore, as of May, 1973, Mr. Dunn's salary was higher than the plaintiff's due to factors other than sex.

In 1974 the Union was certified for the first time as the collective bargaining representative for Chrysler employees in the office, clerical and technical areas. During the course of negotiations for the first contract between the parties, it was discovered that certain employees, both male and female, held classifications and accompanying pay grades which did not reflect the actual job duties of these individuals at that time (Chrysler answers to second set of interrogatories, answer 4, pp. 3-4). To rectify this situation, Chrysler and the

Union agreed to "red-circle" the individuals, both male and female, in that situation, so long as they remained on the job with the understanding that if they left the job, their replacements would be assigned the appropriate classification and salary grade (Id., No. 4, pp. 3-4). Ten men and three women were "red-circled" pursuant to this agreement. The "red-circling" agreement and the other provisions of the proposed collective bargaining agreement were explained to the employees at a ratification meeting and the agreements were thereafter ratified. Watkins' Affidavit, Ferguson Affidavit, p. 5.

The Court finds that the "red-circle" provision in this case is a valid sex-neutral resolution of the pay disparity which Chrysler and the Union faced when they negotiated the collective

bargaining agreement. The plaintiff's reliance on Hodgson v. Goodyear Tire and Rubber Co., 358 F.Supp. 198 (N.D. Ohio 1973), is misplaced. In that case the checkers were classified based on sex in accordance with Ohio statutes then in effect. The court in Hodgson disallowed continuation of the pay disparity after the jobs became equal because the original disparity had been based on sex. In this case, the original pay disparity was not based on sex.

During the first month of the 1974-1977 collective bargaining agreement, the plaintiff, classified as a Tech-Test & Analysis, Salary Grade 7, received $208.35 per week. Mr. Dunn, "red-circled" at the wage rate for Illustrator-Graphic B, Salary Grade 9, received $224.26 per week. Thereafter, both the plaintiff and Mr. Dunn received general

increases in the same dollar amount and merit increases pursuant to the sex-neutral provisions of the collective bargaining agreement. Exhibit A to Chrysler's answer to plaintiff's first set of interrogatories.

During the negotiations for the 1977 collective bargaining agreement, Mr. Dunn, who was then Union President, agreed to a change in classification to the lower grade, Color Specialist-Styling, Salary Grade 8. The plaintiff was promoted to the same classification and grade. Because of this promotion, the plaintiff received a 3% wage increase to $273.95. Due to the sex-neutral lower grade provisions of the collective bargaining agreement, Mr. Dunn retained his old wage rate of $290.83. Thereafter both the plaintiff and Mr. Dunn received general wage increases and cost of living

in the same dollar amount pursuant to the collective bargaining agreement. Chrysler's answers to plaintiff's first and second set of interrogatories.

Therefore, the Court finds that at all times relevant the difference in wages between the plaintiff and Mr. Dunn was due to factors other than sex. Accordingly, the plaintiff's motion for summary judgment will be denied and the defendants' motions for summary judgment will be granted.

THEREFORE, for the above stated reasons, good cause appearing, it is

ORDERED that the plaintiff's motion for summary judgment should be, and hereby is, DENIED; and it is

FURTHER ORDERED that the Union's motion for summary judgment should be, and hereby is, GRANTED; and it is

FURTHER ORDERED that Chrysler's motion for summary judgment should be, and hereby is, GRANTED; and it is

FURTHER ORDERED that the plaintiff's complaint should be, and hereby is, DISMISSED.

/s/ JOHN W. POTTER

United States District Judge

APPENDIX B

Opinion and Order of the Court of Appeals

(Decided and Filed August 8, 1984)

No. 83-3273

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

BETTY A. ROSEN,

Plaintiff-Appellant,

vs.

CHRYSLER PLASTIC PRODUCTS CORP., et al.,

Defendants-Appellees.

Appeal from United States District Court
for the Northern District of Ohio.

Before: KEITH and MARTIN, Circuit Judge, and SWYGERT*.

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*Honorable Luther M. Swygert, United States Court of Appeals for the Seventh Circuit, sitting by designation.

PER CURIAM: This is an appeal by plaintiff, Betty A. Rosen, from an unpublished opinion and order by the Honorable John W. Potter of the United States District Court for the Northern District of Ohio. Judge Potter granted a motion for summary judgment in behalf of the defendants, Chrysler Plastic Products Corporation and the United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.) Local 1879. For the reasons set forth below, we affirm the decision of the district court.

The plaintiff filed a complaint pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et. seq., alleging that the defendants discriminated against her on the basis of sex. Specifically, plaintiff claimed that Chrysler paid a higher wage to a male employee, although both employees

performed substantially equal work in the same department. The trial court disagreed and ruled that the plaintiff and her male counterpart were performing different duties at least until 1974 or 1975 and thus the initial wage differential was due to a factor other than sex. Rosen v. Chrysler Plastic Products Corp., No. C79-93, slip op. at 8, 9 (N.D. Ohio Mar. 28, 1983).

The plaintiff also challenged an aspect of the first collective bargaining agreement between Chrysler and the Union which "red-circled"[1] the salaries paid to thirteen individuals, including the plaintiff's male counterpart. During the

---

[1]The term "red-circle rates" is borrowed from War Labor Board parlance and describes certain unusual, higher than normal wage rates which are maintained for many valid reasons. See generally Rosen v. Chrysler Plastic Products Corp., No. C79-93, slip op. at 6-8 (N.D. Ohio Mar. 28, 1983) (discussing red-circling in various context).

negotiation of this initial union contract, in 1974, it was discovered that these thirteen employees held classifications and accompanying pay grades which did not reflect their actual job duties. Chrysler and the Union agreed to "red-circle" these employees and pay them at their former higher salary for as long as they remained on the job. It was also agreed, however, that once these thirteen employees left the job, their replacements would be assigned the appropriate classification and salary grade. The trial court ruled that the "red-circle" provision in this case was a valid sex-neutral resolution to the pay disparity which Chrysler and the Union faced when they negotiated the collective bargaining agreement. Id. at 9. Based upon these findings, the trial court concluded that at all relevant times the difference in

wages paid the plaintiff and her male counterpart was due to factors other than sex and accordingly granted the defendants' motions for summary judgment. Id. at 10.

Given the thorough and thoughtful opinion prepared by Judge Potter, we adopt the findings and conclusions of that opinion. Accordingly, we affirm the judgment of the Honorable John W. Potter of the United States District Court for the Northern District of Ohio.

CERTIFICATION

This is to certify that three copies of the foregoing Petition for a Writ of Certiorari was served upon each of the respondents in the foregoing cause, by sending same by ordinary mail, with postage prepaid, on this 5th day of November, 1984, addressed as follows:

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(3)

No. 84-743

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BETTY A. ROSEN,

Petitioner,

v.

CHRYSLER PLASTIC PRODUCTS CORPORATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT CHRYSLER PLASTIC PRODUCTS CORPORATION'S BRIEF IN OPPOSITION TO THE PETITION

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December 6, 1984

36pp

QUESTIONS PRESENTED

As viewed by respondent Chrysler Plastic Products Corporation, the instant petition presents the following questions:

1. Whether variances in wages which are the result of "... a differential based on any other factor other than sex ..." are permissible under Title VII.

2. Whether either a district court or an appeals court is required to presume that a Title VII defendant acts unlawfully.

3. Whether after a district court has rendered an error-free decision against a claimless Title VII plaintiff and an appeals court has correctly affirmed that decision, this Court should be persuaded by unsupported and unsupportable arguments to permit review of those decisions.

PARTIES

The petitioner is Betty A. Rosen (herein either "petitioner" or "Ms. Rosen"). Ms. Rosen was the plaintiff in the district court and the appellant in the Sixth Circuit.

The respondents are Chrysler Plastic Products Corporation (herein either "respondent Chrysler" or "Chrysler"), petitioner's employer, and the United Auto Workers Local 1879 (herein either "respondent Union" or "Union"), petitioner's union. Chrysler and the Union were the defendants in the district court and the appellees in the Sixth Circuit.

Respondent Chrysler, a wholly-owned subsidiary of Chrysler Corporation, filed a disclosure of corporate affiliations and financial interest dated May 25, 1983, with the Sixth Circuit.

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IN THE

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No. 84-743

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Petitioner,

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Respondents.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Ohio, Western Division, has not been reported and is printed as Appendix A to the petition. The opinion of the United States Court of Appeals for the Sixth Circuit has not been reported and is printed as Appendix B to the petition. The Sixth Circuit's affirmance of the district court's decision is noted under "decisions without published opinions" at 742 F.2d 1457.

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Equal Pay Act of 1963, 29 *U.S.C.A.* §§ 206(d)(1) and (2) (herein "Equal Pay Act"), and of Title VII of the Civil Rights Act of 1964, as amended, 42 *U.S.C.A.* §§ 2000e *et seq.* (herein "Title VII"), are reproduced in the petition, pp. 7-10.

Some pertinent portions of the regulations with respect to the Equal Pay Act are reproduced in the petition, pp. 10-13, but 29 *C.F.R.* § 800.147 does not appear to be pertinent here. In addition, 29 *C.F.R.* § 800.141, which is cited in the petition, p. 16, is not reproduced.

STATEMENT OF THE CASE

The instant action involves averred sexual discrimination in employment in claimed violation of Title VII. Petitioner's action is supported by neither the facts nor the law.

In order to place the questions presented for review in proper perspective, it is necessary to review some facts from many years ago. Unfortunately, since petitioner's supposed statement of the case in her petition is so distorted and misleading, this statement, for this additional reason, is longer than what is normally to be preferred. For the Court's convenience, the facts covering this lengthy time span will generally be summarized in their approximate chronological order.

Since on or about August 9, 1968, respondent Chrysler has been engaged in manufacturing in Erie County, Ohio. Its facilities at said location are commonly referred to as the Sandusky Plant (herein "Sandusky Plant").

On or about August 9, 1968, the Sandusky Plant was purchased from the Air Reduction Company (herein "Airco"). Ms. Rosen and one Gary B. Dunn (herein "Mr. Dunn") had been employees of Airco, and they thereafter became employees of respondent Chrysler.

After the purchase of Airco in 1968, and after respondent Chrysler began to manufacture at the Sandusky Plant, evaluations and reclassifications of all jobs were begun. In doing so, and after subsequent changes in work content of some jobs, respondent Chrysler also began to discover that some employees were paid and classified in higher graded classifications while performing the tasks of lower graded classifications.

In 1973, the first year for which Ms. Rosen is attempting to assert a claim for wages, she was in the classification of "Technician-Test & Analysis" at grade "7", and Mr. Dunn was in the classification of "Illustrator-Graphic B" at grade

"9". At that time, respondent Chrysler had an equal employment opportunity policy and also had a sex-neutral salary structure. As to this approximate time period, Ms. Rosen has also admitted that she was then doing "... color matching ..." and that Mr. Dunn was working "... on the drawing board...."

On or about January 2, 1974, the National Labor Relations Board (herein "NLRB") issued a "certification of representative" for a salaried collective bargaining unit of certain salaried employees at the Sandusky Plant. Ms. Rosen and Mr. Dunn were, and are, employees within said unit, and respondent Union became, and is, their collective bargaining agent.

During 1974, collective bargaining negotiations began for the first collective bargaining agreement between respondent Union and respondent Chrysler.

In these initial negotiations, respondent Union proposed, and respondent Chrysler later agreed, that any employee, whether male or female, who was determined to be receiving an inappropriately high rate of pay as a result of overclassification should be "red circled" so that such an employee, whether male or female, would not take a pay reduction. It was later determined that thirteen employees should be so "red circled." Of such thirteen employees, ten happened to be male, one of whom was Mr. Dunn, and three happened to be female.

Later in 1974, the first collective bargaining agreement between respondent Union and respondent Chrysler was negotiated. It was dated December 9, 1974, and its approximate three-year term, subject to its other provisions, extended until November 23, 1977 (herein "1974-1977 Agreement").

Under the 1974-1977 Agreement, the pay of an employee was basically determined by classification, grade, and corresponding salary range. Variances between salaries of

employees performing the same work were normal and natural occurrences due to the fact that each classification had a substantial salary range through which an employee may advance by automatic progression increases as well as by performance increases. Such variances occurred as a result of factors other than sex. In addition, the 1974-1977 Agreement also contained so-called "lower grade" provisions, which were sex-neutral provisions to protect employees, both male employees and female employees, from wage reductions in certain situations, such as that presented here. (As will also be noted below, subsequent collective bargaining agreements have also contained similar sex-neutral provisions.)

During the term of the 1974-1977 Agreement, several other activities occurred which perhaps should also be briefly noted here. Such activities are so noted merely in the interests of presenting a more complete review of the facts, and they are not decisive for present purposes.

First, on or about September 15, 1975, Ms. Rosen filed a grievance with respect to the pay differential between her and Mr. Dunn, which resulted in a no liability resolution on or about June 17, 1976.

Second, on or about September 24, 1975, plaintiff filed a discrimination charge with the Equal Employment Opportunity Commission (herein "EEOC") against respondent Chrysler and respondent Union with respect to said pay differential, which resulted in the EEOC's issuance of a "notice of right to sue" on or about January 25, 1979.

Third, on or about August 31, 1976, plaintiff filed a discrimination charge affidavit with the Ohio Civil Rights Commission (herein "OCRC") against respondent Chrysler (and against respondent Union) with respect to said pay differential, which resulted in the OCRC's issuance of a ". . . NO PROBABLE CAUSE . . ." letter on or about June 7, 1977.

In 1977, the second collective bargaining agreement between respondent Union and respondent Chrysler was negotiated. It was dated December 8, 1977, and its approximate three-year term, subject to its other provisions, extended until November 23, 1980 (herein "1977-1980 Agreement").

On December 19, 1977, and also as a result of the 1977 negotiations, Ms. Rosen was changed from the classification of "Technician-Test & Analysis" at grade "7" to the new classification of "Color Specialist-Styling" at grade "8", and Mr. Dunn was changed from the classification of "Illustrator-Graphic B" at grade "9" to the new classification of "Color Specialist-Styling" at grade "8", which were the same classification and same grade as petitioner's were. At that time, Ms. Rosen's rate was increased from $266.90 to $273.95, and Mr. Dunn's rate, which was not changed, remained at $290.83.

In 1980, the third collective bargaining agreement between respondent Union and respondent Chrysler was negotiated. It was dated October 16, 1980, and its approximate three-year term, subject to its other provisions, extended until November 23, 1983 (herein "1980-1983 Agreement").

Under each of the above-noted three collective bargaining agreements, the pay of an employee was basically determined by classification, grade, and corresponding salary range. Variances between salaries of employees performing the same work were normal and natural occurrences due to the fact that each classification had a substantial salary range through which an employee may advance by automatic progression increases as well as by performance increases, and such variances occurred as a result of factors other than sex. Each of these three collective bargaining agreements also contained sex-neutral provisions to protect employees, both male employees and female employees, from wage reductions in situations such

as that presented here. In addition, the wages of both male employees and female employees were protected from wage reductions as a result of such sex-neutral provisions during the term of each such agreement.

As demonstrated in the prior proceedings, and contrary to the mistaken wailing in the petition, at p. 20, under the sex-neutral wage structures and related provisions which have been, and presently are, in effect for employees such as Ms. Rosen and Mr. Dunn, wage differentials for different individuals with the same classification and the same grade cease when such individuals reach the maximum rate for the applicable classification and grade. At this time, however, neither Ms. Rosen nor Mr. Dunn has yet reached the maximum rate for grade "8".

On or about February 16, 1979, Ms. Rosen commenced the instant action by the filing of a complaint against respondent Chrysler and respondent Union. In her complaint, Ms. Rosen averred that she has been, and is being, paid less than Mr. Dunn. In doing so, she also attempted to assert that such wage differentials were a result of unlawful sex discrimination by respondent Chrysler and respondent Union in violation of Title VII.

Each respondent thereafter filed an answer to the complaint; each of such answers included a defense in the nature of a general denial and other defenses. Later, discovery was also undertaken by each party.

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, each respondent subsequently filed a motion for summary judgment, a supporting brief, and a supporting affidavit. (Fed. Rules Civ. Pro. Rule 56, 28 *U.S.C.A.*) Both motions were based on the statutory premise that "... a differential [in wages] based on any other factor than sex ...", even when substantially equal work is involved, is lawful. (29 *U.S.C.A.* § 206(d)(1).)

In addition, petitioner also later filed a motion for summary judgment, but "... at oral argument [on November 29, 1982, she] ... conceded ... [that her motion was precluded by the factual question as to whether she and Mr. Dunn performed equal work within the permissible time period under Title VII and] requested that the Court consider her motion as one for partial summary judgment as to the issue of whether the 'red-circling' in this instance is based on sex or is sexually discriminatory in impact." Respondent Chrysler also submitted a brief and three affidavits in opposition to plaintiff's motion for summary judgment, and respondent Union also submitted a similar brief and affidavit.

On March 28, 1983, the district court filed an opinion and order and also an accompanying judgment denying petitioner's motion for summary judgment, granting the respondents' separate motions for summary judgment, and dismissing petitioner's complaint.

In the opinion and order filed on March 28, 1983, the district court began its summation of the above-noted material facts with this telling sentence:

> "The following relevant facts are *undisputed*. ..." (Emphasis added. Opinion and Order, p. 1 (Petition, p. 26).)

The district court, after reviewing the facts, properly determined:

> "The Court finds that the wage differential between the plaintiff and Mr. Dunn as of May, 1973, was due to a factor other than sex. It is *undisputed* that until sometime in 1971 Mr. Dunn worked on the drawing board, a task that the plaintiff never performed. It is also *undisputed* that at least until May, 1973, Mr. Dunn performed some work on the drawing board, as well as other tasks, which the plaintiff did not do. Because Mr. Dunn performed these tasks he was classified in a job title which put him in a higher salary grade than the plaintiff. Therefore, as of May, 1973,

Mr. Dunn's salary was higher than the plaintiff's due to factors other than sex.

* * *

"The Court finds that the 'red-circle' provision in this case is a valid sex-neutral resolution of the pay disparity which Chrysler and the Union faced when they negotiated the collective bargaining agreement. . . .

* * *

". . . Due to the sex-neutral lower grade provisions of the collective bargaining agreement, Mr. Dunn retained his old wage rate. . . .

* * *

"Therefore, the Court finds that at all times relevant the difference in wages between the plaintiff and Mr. Dunn was due to factors other than sex. . . ."
(Emphasis added. Opinion and Order, pp. 9-10 (Petition, pp. 46-47, 48-49, 50, 51).)

On April 14, 1983, plaintiff filed a notice of appeal to the Sixth Circuit. Extensive briefs were then filed with the Sixth Circuit, and oral arguments were thereafter heard by the Sixth Circuit. On August 8, 1984, the Sixth Circuit, by a *per curiam* opinion, affirmed the district court's judgment.

". . . The trial court . . . ruled that the plaintiff and her male counterpart were performing different duties at least until 1974 or 1975 and thus the initial wage differential was due to a factor other than sex. . . .

". . . [In 1974] Chrysler and the Union agreed to 'red-circle' these [thirteen misclassified] employees and pay them at their former higher salary for as long as they remained on the job. It was also agreed, however, that once these thirteen employees left the job, their replacements would be assigned the appropriate classification and salary grade. . . . [T]he trial court concluded that at all relevant times the difference in wages paid the plaintiff and her male counterpart was due to factors other than sex. . . .

> "Given the thorough and thoughtful opinion prepared by Judge Potter, we adopt the findings and conclusions of that opinion. . . ."
> (*Per Curiam* Opinion, pp. 1-2 (Petition, pp. 55-57).)

On November 6, 1984, the instant petition for certiorari was served upon respondent Chrysler. On its face, the petition shows no good reason for this Court to review the decision of the Sixth Circuit. Review by this Court is neither warranted nor appropriate.

SUMMARY OF ARGUMENT

In the instant action, the decisive facts are either admitted by petitioner or are not disputed (or cannot be disputed) by petitioner. The applications of the law by both the district court and the Sixth Circuit to those facts were correct. Petitioner has completely and totally failed to establish that there has been unlawful discrimination "... because of ... sex ..." as to her. (42 *U.S.C.A.* § 2000e-2(a).) In so failing, petitioner has already taken more than her share of the resources and energies of the judicial system and her opposing litigants. As matters of both fact and law, as both the district court and the Sixth Circuit have properly so determined, there has been no such unlawful discrimination "... because of... sex ..." as to petitioner. (42 *U.S.C.A.* § 2000e-2(a).)

In addition, respondents also established beyond cavil that the differential in wages between petitioner and Mr. Dunn was lawful at all relevant times. Variances in wages which are the result of "... a differential based on any other factor other than sex ..." are permissible under Title VII. (29 *U.S.C.A.* § 206(d)(l).) The variances between the wages paid to petitioner and the wages paid to Mr. Dunn were the result of such permissible differentials based on factors other than sex. (42 *U.S.C.A.* § 2000e-2(h).)

The "red circling" and "lower grade" provisions utilized by respondents here are widely used throughout industry

by employers and unions, and their utilization was proper here. Neither the district court nor the appeals court was required to presume that the respondents acted unlawfully, and it was also established that they did not do so.

The decisions by both the district court and the Sixth Circuit were correct. Under all of the circumstances present here, such decisions were virtually compelled, and further review of those decisions is neither warranted nor appropriate. Further review should now be declined by this Court.

ARGUMENT—REASONS FOR DENYING THE PETITION

The petition reveals upon its face, p.14, a scope limited to the disgruntlement of one woman at the compared remuneration of one man. If this Court is to undertake review of every pique of an employee toward a fellow employee under circumstances such as those present here, many widespread legal problems must be ignored.

Here, the circumstances were carefully considered and determined by both the district court and the appellate court. The petition does not even attempt to assert the more or less traditional grounds for seeking review. This is not particularly surprising since an attempt to have done so would only have further demonstrated why review is neither warranted nor appropriate here. No basis for error or conflicts between appellate courts has been suggested. This is simply not the type of case that demands or requires this Court's precious time. For the additional reasons set forth below, the petition should be denied.

I. VARIANCES IN WAGES WHICH ARE THE RESULT OF "... A DIFFERENTIAL BASED ON ANY OTHER FACTOR OTHER THAN SEX ..." ARE PERMISSIBLE UNDER TITLE VII.

Title VII makes it an unlawful employment practice for an employer

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, *sex*, or national origin; . . . ."
>
> (Emphasis added. 42 *U.S.C.A.* § 2000e-2(a).)

The last sentence of Section 703(h) of Title VII, known as the Bennett Amendment, further provides as follows:

> ". . . It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29."
>
> (42 *U.S.C.A.* § 2000e-2(h).)

In *County of Washington v. Gunther*, 452 U.S. 161 (1981), the Supreme Court held that the Bennett Amendment incorporates the four affirmative defenses of the Equal Pay Act, 29 *U.S.C.A.* § 206(d)(1)(i)-(iv), into Title VII for sex-based wage discrimination claims.

The Equal Pay Act provides in most pertinent part as follows:

> "(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees *on the basis of sex* by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, *except where such payment is made pursuant to* (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) *a differential based on any other factor other than sex: Provided*, That an employer who is paying a

> wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."
>
> (Emphasis in original; selective emphasis added. 29 *U.S.C.A.* § 206(d)(1).)

Thus, the Equal Pay Act establishes three specific exclusions and one broad general exclusion as affirmative defenses to claims of sex-based wage discrimination. The House Committee on Education and Labor, which considered the Equal Pay Act, explained the purpose of these exclusions as follows:

> "... It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, *the broad general exclusion has been also included.*"
>
> (Emphasis added. H.R.Rep. No. 309, 88th Cong., 1st Sess. (1963), *reprinted in* 1963 *U.S. Code Cong. & Ad. News* 687, at p. 689.)

In *County of Washington v. Gunther*, 452 U.S. 161, 171 (1981), this Court, in reviewing the legislative history as to the fourth exclusion, stated:

> "... Representative Griffin, for example, explained that the fourth affirmative defense is *a 'broad principle,'* which 'makes clear and explicitly states that a differential based on any factor or factors other than sex would not violate that legislation.' 109 Cong. Rec. 9203 (1963). See also *id.*, at 9196 (remarks of Rep. Frelinghuysen); *id.*, at 9197-9198 (remarks of Rep. Griffin); *ibid.*, (remarks of Rep. Thompson); *id.*, at 9198 (remarks of Rep. Goodell); *id.*, at 9202 (remarks of Rep. Kelly); *id.*, at 9209 (remarks of Rep. Goodell); *id.*, at 9217 (remarks of Reps. Pucinski and Thompson)."
>
> (Selective emphasis added.)

Variances in the payment of wages to employees of the opposite sex for "... equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions ..." are permissible provided such variances in payment are

made pursuant to one of the four exclusions authorized by the Equal Pay Act.

The fourth exclusion is fully applicable here, and it permits variances in payment made pursuant to "... a differential based on any other factor other than sex. ..." (29 *U.S.C.A.* § 206(d)(1).) As demonstrated to both the district court and the Sixth Circuit, such unequal payments made pursuant to "... a differential based on any other factor other than sex ..." have been upheld in a wide variety of cases. For examples, see: *Salazar v. Marathon Oil Co.*, 502 F. Supp. 631 (S.D. Tex. 1980), where the court held that longevity of service is a permissible factor other than sex upon which wage differentials may be based without violating the Equal Pay Act; *EEOC v. Cleveland State Univ.*, 28 FEP Cases 1782 (N.D. E.D. Ohio 1982), where the court held that a seniority system is a factor other than sex upon which wage differentials may be based without violating the Equal Pay Act; *Equal Employment, Etc. v. Aetna Ins. Co.*, 616 F. 2d 719 (4th Cir. 1980), where the Fourth Circuit held that the existence of two distinct salary programs, neither of which had sex discrimination as a purpose or an effect, is a factor other than sex upon which wage differentials may be based without violating the Equal Pay Act; *Strecker v. Grand Forks County Social Service Board*, 640 F. 2d 96 (8th Cir. 1981), where the Eighth Circuit held that the existence of the state personnel classification system which limited the plaintiff's salary level is a permissible factor other than sex upon which wage differentials may be based without violating the Equal Pay Act; *Piva v. Xerox Corporation*, 654 F. 2d 591 (9th Cir. 1981), where the Ninth Circuit held that education, training, and experience are permissible factors other than sex upon which wage differentials may be based without violating the Equal Pay Act; *Trent v. Adria Labs.*, 28 FEP Cases 353 (N.D. Ga. 1982), where the court held that prior experience was a permissible factor other than sex upon which wage differentials may be based without violating

the Equal Pay Act; *Kouba v. Allstate Ins. Co.*, 691 F. 2d 873, 876-877 (9th Cir. 1982), where the Ninth Circuit stated that "... the Equal Pay Act entrusts employers, not judges, with making the often uncertain decision of how to accomplish business objectives ... [and] Congress did not limit the exception to job-evaluation systems ... [and] instead, it excepted 'any other factor other than sex' and thus created a 'broad general exception'..."; *Hein v. Oregon College of Educ.*, 718 F. 2d 910, 921 (9th Cir. 1983), where the Ninth Circuit stated that "... the court should be slow to reject OCE's defense unless it determines that OCE's justifications do not reasonably explain the differences in starting salaries ..."; *Winkes v. Brown University*, —F. 2d—(1st Cir. 1984) (36 FEP Cases 120, 121), where the First Circuit stated that the meeting of a competitive offer fell within "... the general one [exception], a differential based on any other factor other than sex...."

The Third Circuit analyzed at length the "... any other factor other than sex ..." exception in *Hodgson v. Robert Hall Clothes, Inc.*, 473 F. 2d 589 (3d Cir. 1973), *cert. denied*, 414 U.S. 866 (1973). There, the Third Circuit held that, where the defendant's men's department was more profitable than its women's department, the difference in profitability of the two departments justified differentials in base salary paid to employees in the two departments, regardless of individual performances of the individual employees in the two departments. In so holding, the Third Circuit reviewed at length the legislative history of the Equal Pay Act and stated in part:

> "In providing for exceptions, the statute states that they will apply when the males and females are doing equal work. Congress thus intended to allow wage differentials even though the contrasted employees were performing equal work...."
> (473 F. 2d 589, at p. 594.)
>
> "Representative Goodell, a key sponsor of the Act, said:

'. . . [T]here are many factors that can be taken into consideration in working out differentials of pay among employees . . . which would be proper under this legislation so long as they were based on those factors and not on the basis of whether employees are women or men.' 109 Cong.Rec. 9206.

* * *

'If he [the employer] has a reasonable standard of differentiation, the Labor Department is not to come in, even, and judge the reasonableness or unreasonableness of this differentiation among employees, except as it shows a clear pattern of discrimination against sex.' 109 Cong.Rec. 9208 (1963).

Rep. Griffin stated:

'I should like to focus the attention of the gentlemen upon roman numeral iv, at the top of page 3 which makes clear and explicitly states that a *differential based on any factor or factors other than sex would not violate this legislation. In other words, even though jobs involve the same skill, equal effort, equal responsibility, and are performed under the same working conditions, if there is any other factor not based on sex upon which a differential is based, then no violation of this law can be found.* Roman numeral iv is a broad principle, and those preceding it are really examples: such factors as a seniority system, a merit system, or a system which measures earnings on the basis of quality or quantity of production. The other body saw fit to leave out references in the bill to a merit system, a system which measures on the basis of quality and quantity, and a seniority system, and included only the broad language found in roman numeral iv of our bill. However, it should be clear that under either bill a wage differential based upon any factor other than sex is not a violation.' 109 Cong.Rec. 9203 (1963) (Rep. Griffin, R., Mich.) (emphasis supplied)

And the House Committee report stated:

'Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any

> of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included.' H. Rept. 309, 88th Cong., 1st Sess. U.S.Code Cong. and Adm. News, p. 689 (1963)."
>
> (Emphasis in original. 473 F. 2d 589, at pp. 595-596.)
>
> "... [T]he legislative history set forth above indicates a Congressional intent to allow reasonable business judgments to *stand*. ... Robert Hall's method of determining salaries does not show the 'clear pattern of discrimination,' (Rep. Goodell, 109 Cong. Rec. 9203), that would be necessary for us to make it correlate more precisely the salary of each of its employees to the economic benefit which it receives from them. ..."
>
> (Emphasis added. 473 F. 2d 589, at p. 597.)

As noted above, this Court denied review.

Here, too, there is, and can be, no such showing of a "...'clear pattern of discrimination'...", and the "... reasonable business judgments ..." of the respondent Union and the respondent Company in protecting the wages of both female employees and male employees in a sex-neutral manner in the applicable situations should "... stand. ..."

Initial variances in wages paid petitioner and fellow employee Mr. Dunn were the result of a factor other than sex. Mr. Dunn is one of the employees who was "red circled" in 1974, when the first collective bargaining agreement was entered into between respondent Chrysler and respondent Union. The policy under which Mr. Dunn was "red circled" was sex-neutral. Under said policy, thirteen employees, including Mr. Dunn, were "red circled". Of those thirteen employees, ten happened to be men and three happened to be women.

The principle of "red circling" has long been recognized as a permissible "... differential based on any other factor other than sex. ..." The principle of "red circling" was

recognized by the House Committee on Education and Labor, which stated at the time the Equal Pay Act was passed, that the fourth exclusion for a factor other than sex was meant to encompass, among other things, the following:

> "... This term [red circle rates] is borrowed from War Labor Board parlance and describes certain unusual, higher than normal wage rates which are maintained *for many valid reasons.* For instance, it is not uncommon for an employer who must reduce help in a skilled job to transfer employees to other less demanding jobs but to continue to pay them a premium rate in order to have them available when they are again needed for their former jobs."
>
> (Emphasis added. H.R.Rep. No. 309, 88th Cong., 1st Sess. (1963), *reprinted in* 1963 (*U.S. Code Cong. & Ad. News 687, at p. 689).)*

The principle of "red circling" is also recognized in the regulations promulgated by the Department of Labor wherein it is stated:

> "The term 'red circle' rates describes certain unusual, higher than normal, wage rates which are maintained *for many reasons.* An example of the use of a 'red circle' rate might arise in a situation where a company wishes to transfer a long-service male employee, who can no longer perform his regular job because of ill health, to different work which is now being performed by women. Under the 'red circle' principle the employer may continue to pay the male employee his present salary, which is greater than that paid to the women employees for the work both will be doing. Under such circumstances, maintaining an employee's established wage rate, despite a reassignment to a less demanding job is a valid reason for the differential even though other employees performing the less demanding work would be paid at a lower rate, since the differential is based on a factor other than sex."
>
> (Emphasis added. Equal Pay for Equal Work under the Fair Labor Standards Act, 29 *C.F.R.* § 800.146 (1981).)

The principle of "red circling" has also been recognized by the courts as a permissible factor other than sex. In

Marshall v. J. L. Hudson Co., 25 FEP Cases 1101 (E.D. Mich. 1979), the court explained the principle of "red circling" at p. 1106:

> "The 'red circle' principle operates to permit, in extraordinary instances and on an *ad hoc* basis, the maintaining of disparate wage-rates with respect to workers of different sexes performing essentially equal work, *notwithstanding the proscriptions contained in the Act*.... 'Red circling' has yet to be defined in all its manifestations; *the flexibility of the concept has been preserved* by anticipation of the particular needs that may arise in attempting to reconcile legitimate business necessities with the dictates of the Act...."
> (Selective emphasis added.)

"Red circling" remarkably similar to that agreed to by respondent Chrysler with respondent Union was also upheld by the court in *Mangiapane v. Adams*, 20 FEP Cases 699 (D. D.C. 1979). In that case, plaintiff brought an action asserting a violation of the Equal Pay Act based upon the admitted fact that a male program analyst in the same division of the Federal Aviation Administration was being paid at a higher rate even though his position and plaintiff's both required substantially equal skill, effort, and responsibility, and were both performed under similar conditions. Defendants averred that the salary differential was based upon a factor other than sex—a reorganization which called for the "red circling" of then current GS-13 program analyst positions and the filling of those positions as they were vacated with GS-12 program analysts. The court held that such "red circling" was permissible because it perpetuated no prior unlawful bias and stated at p. 701:

> "... The agency [the FAA] merely sought to mitigate the impact of a potentially demoralizing adjustment in job classifications. Nor was the decision sexually discriminatory in its impact. It benefited all of the incumbent GS-13's—nine men and two women—regardless of their sex and affected all the incumbent GS-12's—seven men and one woman—regardless of sex...."

Similarly, the "red circling" agreed to by respondent Chrysler with respondent Union perpetuated no prior unlawful bias. The use of "red circling" was merely an attempt to "... mitigate the impact of a potentially demoralizing adjustment in job classifications. ..." Nor was the decision to use "red circling" "... sexually discriminatory in its impact. ..." The decision benefited thirteen employees—ten who happened to be men and three who happened to be women—regardless of their sex. The district court properly determined:

> "The Court finds that the 'red-circle' provision in this case is a valid sex-neutral resolution of the pay disparity which Chrysler and the Union faced when they negotiated the collective bargaining agreement. ..."
>
> (Opinion and Order, p. 9 (Petition, pp. 48-49).)

Subsequent to the "red circling" of Mr. Dunn which resulted in a permissible variance between the wages paid petitioner and those paid Mr. Dunn, respondent Chrysler engaged in three sets of collective bargaining negotiations with respondent Union. Under each of the three negotiated collective bargaining agreements, salary structures were agreed upon under which, and as a result of factors other than sex, some variances occurred between the wages paid to employees of one sex and employees of the opposite sex who performed work equal to, or nearly equal to, their counterparts of the opposite sex. Under such salary structures, sometimes female employees who performed such work were paid more than their male counterparts and other times male employees who performed such work were paid more than their female counterparts. In every case, variances in the wages paid were based upon factors other than sex. Each of these three collective bargaining agreements contained sex-neutral salary structures and "lower grade" provisions which protected the wages of employees, both female employees and male employees, from wage reductions in applicable situations. Mr. Dunn

was one of those employees who were so protected. The salary structures in each of the three negotiated collective bargaining agreements thereby preserved permissible variances in the wages paid to female and male employees.

Variances between the wages paid to petitioner and the wages paid to Mr. Dunn occurred as a result of factors other than sex. Initial variances occurred as a result of the use of the accepted principle of "red circling" - a differential based on a factor other than sex. Other variances occurred as a result of the three negotiated collective bargaining agreements. Each of these three collective bargaining agreements was the result of careful negotiations between respondent Chrysler and respondent Union, petitioner's collective bargaining agent. Under each of the three negotiated collective bargaining agreements, salary structures were agreed upon under which, and as a result of factors other than sex, some variances occurred between the wages paid to employees of one sex who performed work equal to, or nearly equal to, their counterparts of the opposite sex. Under such salary structures, the wages paid to employees, both female employees and male employees, were basically determined by classification, grade, and corresponding salary range. Variances between salaries of employees performing the same work are normal and natural occurrences due to the fact that each classification has a substantial salary range through which an employee may advance by automatic progression increases as well as by performance increases. Such increases are the result of factors other than sex. In addition, each of the three negotiated collective bargaining agreements contained "lower grade" provisions which protected the wages of employees, both female and male employees, from wage reductions. The salary structures in each of the three negotiated collective bargaining agreements thereby preserved permissible variations in the wages paid to female and male employees.

Variances in wages which are the result of "... a differential based on any other factor other than sex ..." are permissible under Title VII. The variances between the wages paid to petitioner and the wages paid to Mr. Dunn were the result of such permissible differentials based on factors other than sex. Therefore, based on the authorities cited above, petitioner's action is without merit, and judgment dismissing petitioner's action was properly entered by the district court and was properly affirmed by the Sixth Circuit.

II. NEITHER A DISTRICT COURT NOR AN APPEALS COURT IS REQUIRED TO PRESUME THAT A TITLE VII DEFENDANT ACTS UNLAWFULLY.

Title VII, as previously noted, makes it an unlawful employment practice to discriminate "... *because of* ... sex...." (Emphasis added. 42 *U.S.C.A.* § 2000e-2(a).)

In a Title VII action, a plaintiff has the initial burden of establishing a *prima facie* violation and then the ultimate burden of establishing a violation. Claims of employment discrimination under Title VII may arise in two different ways, either through unlawful disparate treatment or through unlawful disparate impact "... because of ..." an unlawful criterion, here sex. (42 *U.S.C.A.* § 2000e-2(a).) (Generally, see also: *Teamsters v. United States*, 431 U.S. 324 (1977); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *U.S. Postal Svc. Bd. of Governors v. Aikens*, —U.S.— (1983) (31 FEP Cases 609).)

In the instant action, both respondents denied any such unlawful disparate treatment and also any such unlawful disparate impact and then established their absences. Responsively, petitioner failed to establish either unlawful disparate treatment or unlawful disparate impact. Thus, whether petitioner's complaint is viewed in terms of either

the unlawful disparate treatment doctrine or the unlawful disparate impact doctrine, or both, petitioner has not met the required burdens. Assertions alone cannot change either the law or the facts. Similarly, petitioner cannot assume an unlawful intent for either respondent Union or respondent Chrysler. And, petitioner does not deny that female employees have benefited from the "red circle" agreement and also from the "lower grade" provisions of the collective bargaining agreements. Quite simply, there has been no unlawful discrimination ". . . because of . . . sex . . ." as to the petitioner, and petitioner has completely and totally failed to establish otherwise. (42 *U.S.C.A.* § 2000e-2(a).)

Even when, unlike here, a *prima facie* violation by Title VII has been established, a defendant ". . . bears only the burden of explaining clearly the nondiscriminatory reason for its actions. . . ." (*Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 260 (1981).) Here, in the absence of a *prima facie* violation, respondent Union and respondent Chrysler have gone far beyond what was required of them. In addition, respondent Union and respondent Chrysler also established that the differential in wages between petitioner and Mr. Dunn was lawful at all material times. (29 *U.S.C.A.* § 206(d)(1).) The district court properly determined:

> "Therefore, the Court finds that at all times relevant the difference in wages between the plaintiff and Mr. Dunn was due to factors other than sex. . . ."
> (Opinion and Order, p. 10 (Petition, p. 51).)

And, on such basis, the Sixth Circuit properly affirmed. (*Per Curiam* Opinion, p. 2 (Petition, pp. 56-57).)

In view of all of the foregoing, it is not surprising that petitioner has failed to cite a single decision for the novel proposition that a Title VII defendant is presumed to act unlawfully.

III. AFTER A DISTRICT COURT HAS RENDERED AN ERROR-FREE DECISION AGAINST A CLAIMLESS TITLE VII PLAINTIFF AND AN APPEALS COURT HAS CORRECTLY AFFIRMED THAT DECISION, THIS COURT SHOULD NOT BE PERSUADED BY UNSUPPORTED AND UNSUPPORTABLE ARGUMENTS TO PERMIT FURTHER REVIEW.

Since the basic reasons and authorities why respondents were entitled to judgment in the district court have previously been set forth by both that court and the Sixth Circuit and also in this brief and remain unimpaired by the petition, those matters need not again be reiterated. Instead, this section of this brief will be confined to responding to the petition and only to those points which might possibly suggest any desirability of any response at all. So structured, this section of this brief will also not attempt to treat each and every irrelevancy, transparency, and the like in the petition, which, in the absence of a requirement to do so, would only unduly and needlessly burden the Court.

Petitioner has advanced the same arguments which were rejected by both the district court and the Sixth Circuit. Once again, petitioner relies almost exclusively on the readily distinguishable decision of *Hodgson v. Goodyear Tire & Rubber Co.*, 358 F. Supp. 198 (N.D. W.D. Ohio 1973), which was also the principal ineffective prop of petitioner's unsupported and unsupportable arguments before both the district court and the Sixth Circuit. (Petition, p. 17.)

In its opinion and order at pp. 9-10 (Petition, p. 49), the district court accurately and properly concluded:

> "... The plaintiff's reliance on *Hodgson v. Goodyear Tire and Rubber Co.*, 358 F. Supp. 198 (N.D. Ohio 1973), is misplaced. In that case the checkers were classified based on sex in accordance with Ohio statutes then in effect. The court in *Hodgson* disallowed continuation of the pay disparity after the jobs became equal *because the original disparity had been based on*

sex. In this case, the original pay disparity was *not* based on sex."

(Emphasis added.)

The Sixth Circuit appropriately and properly affirmed.

In *Hodgson v. Goodyear Tire and Rubber Co.*, 358 F. Supp. 198 (N.D. W.D. Ohio 1973), the "red circling" perpetuated disparate wage rates with respect to workers of different sexes performing essentially the same work. Such wage rates initially had been determined solely on the basis of the sex of the worker. In the instant action, however, petitioner has not shown, nor even averred, that the disparate wage rates paid to petitioner and to Mr. Dunn prior to the 1974 collective bargaining negotiations for the first collective bargaining agreement between respondent Union and respondent Chrysler were determined solely on the basis of sex. In fact, it is undisputed that the initial disparity in wage rates between petitioner and Mr. Dunn was based upon the fact that petitioner and Mr. Dunn were performing different duties.

The evidence submitted is clear that petitioner and Mr. Dunn were performing different duties at least until 1974 or 1975. In her deposition, petitioner stated that she and Mr. Dunn were performing different work until 1974 or 1975. Petitioner's testimony makes it clear that she was doing "... color matching ..." and that Mr. Dunn was "... on the drawing board. ..." (Opinion and Order, p. 8 (Petition, p. 44).) In short, petitioner and Mr. Dunn were performing different duties which resulted in the initial disparity in their respective wage rates.

It is uncontroverted that the initial disparity in wages rates paid to petitioner and Mr. Dunn was made pursuant to "... a differential based on any other factor other than sex. ..." The "red circling" of Mr. Dunn in 1974, when the first collective bargaining agreement was entered into between respondent Chrysler and respondent Union, was pursuant to a policy which was sex-neutral. The "red

circling" perpetuated no prior unlawful bias. The use of "red circling" was merely an attempt to "... mitigate the impact of a potentially demoralizing adjustment in job classifications. ..." Nor was the decision to use "red circling" "... sexually discriminatory in its impact. ..." Thirteen employees, including Mr. Dunn, were "red circled". Of those thirteen employees, ten happened to be men and three happened to be women. Therefore, the district court quite properly concluded that:

> "... [T]he 'red-circle' provision in this case is a valid sex-neutral resolution of the pay disparity which Chrysler and the Union faced when they negotiated the collective bargaining agreement. ..."
> (Opinion and Order, p. 9 (Petition, pp. 48-49).)

Subsequent to the "red circling" of Mr. Dunn which resulted in a permissible variance between the wages paid petitioner and those paid Mr. Dunn, three collective bargaining agreements were negotiated between respondent Chrysler and respondent Union, petitioner's collective bargaining agent. These three collective bargaining agreements merely preserved permissible variations in wages paid to petitioner and Mr. Dunn, variations which were the result of permissible differentials based on factors other than sex. Since initial variances between the wages paid to petitioner and Mr. Dunn were not the result of sex bias, these variances did not become proscribed simply because they were recognized by the sex-neutral, "lower grade" provisions designed to protect employees, both male employees and female employees, from wage reductions, contained in the three negotiated collective bargaining agreements.

Petitioner also cites, among other meaningless citations here, some additional decisions in which courts have also used the "red circle" principle to remedy discrimination. (Petition, pp. 17-18.) Other than further demonstrating that the "red circle" principle has been applied in a wide variety of situations, such decisions are inapplicable here.

In the same vein, the petition, at p. 10, also cites 29 *C.F.R.* § 800.146, "Examples—'red circle' rates, in general", but said section itself broadly states that "...'red circle' rates ...[can be] maintained *for many reasons.* ..." (Emphasis added.)

In the face of all of the foregoing, petitioner still attempts to argue that this defense ("... any other factor other than sex ...") should be given an extremely narrow and extremely unrealistic definition, perhaps even limited to "age or illness". (Petition, pp. 17, 19.) The argument is made despite, and as demonstrated above, the statute's expressly and intentionally broad language ("... any other factor other than sex ..."), the legislative history ("... the broad general exclusion has also been included ..." and the use of "red circle" rates is recognized "... for many valid reasons ..."), the regulations (the use of "red circle" rates is appropriate "... for many reasons ..."), and numerous decisions ("... the flexibility of the concept [of 'red circling'] has been preserved by anticipation of the particular needs that may arise ...").

Indeed, in this very action, the district court has properly determined that "... congressional history supports 'red-circling' as a valid defense ... [and] the United States Department of Labor ... has approved the principle of 'red-circling'..." and "the principle of 'red circling' has also been recognized ... as a permissible factor other than sex ...", and the Sixth Circuit has stated that "...'red circle rates' ... are maintained for many valid reasons. ..." (Opinion and Order, pp. 6, 7 (Petition, pp. 38, 39, 41); *Per Curiam* Opinion, p. 2 (Petition, p. 55).) The petitioner, while purporting to fail to recognize either the necessity for, or the validity of, "red circle" and "lower grade" provisions, claims only to be seeking judicial review by this Court for "guidance" and "clarification." (Petition, pp. 17, 21.) In actuality, petitioner, contrary to all of the above, is now requesting this Court to re-write the statute, its legislative

history, and more, because she lost before both the district court and the Sixth Circuit. Such legislating is inappropriate for any court, even if it were so inclined.

In addition, such a re-writing should not be undertaken by this Court. It is for many valid business and operational reasons that "red circling" and "lower grade" provisions are widely used throughout industry by employers and unions. If they were not so used, employees, both female and male, and also employers would be penalized for their lack of use. Here, too, "red circling" and "lower grade" provisions have been properly used by respondent Union and respondent Chrysler. Indeed, it is also undenied by petitioner that the "red circling" and "lower grade" provisions involved here have benefited both female employees and male employees. In effect, what petitioner is really complaining about is that, since she has not personally benefited by the "red circling" and "lower grade" provisions involved here, she does not like them and is demanding that they be declared unlawful under Title VII. As previously demonstrated herein, it takes far more to establish a violation of Title VII. Moreover, as a unanimous Supreme Court stated in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981):

> "... Title VII ... does not demand that an employer give preferential treatment to minorities or women. ... The statute was not intended to 'diminish traditional management prerogatives.'..."

(See also: *California Brewers Assn. v. Bryant*, 444 U.S. 598, 608 (1980), *reh. denied*, 445 U.S. 973 (1980), where this Court stated that "... it does not behoove a court to second-guess either that [collective bargaining] process or its products ..."; *American Tobacco Co. v. Patterson*, 456 U.S. 63, 77 (1982), where this Court stated that national labor policy favored "... minimal governmental intervention in collective bargaining....")

When, as here, the district court has rendered an error-free decision against a claimless Title VII plaintiff and the appeals court has correctly affirmed that decision, this Court should not be persuaded by unsupported and unsupportable arguments to permit review of those decisions. Under these circumstances, further review is neither warranted nor appropriate, and it should be declined.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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December 6, 1984

CERTIFICATE OF SERVICE

Three copies of the foregoing brief have been mailed first-class postage prepaid this 6th day of December, 1984, to Dennis E. Murray, Esq., an attorney for petitioner herein, at his office at Murray & Murray Co., L.P.A., 300 Central Avenue, Sandusky, Ohio 44870, and also to Joan Torzewski, Esq., an attorney for respondent Union herein, at her office at Lackey, Nusbaum, Harris, Reny & Torzewski, 330 Spitzer Building, Toledo, Ohio 43604.

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No. 84-743

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

BETTY A. ROSEN,

Petitioner,

v.

CHRYSLER PLASTIC PRODUCTS CORPORATION, et al.,

Respondents.

RESPONDENT UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW LOCAL 1879's BRIEF IN OPPOSITION TO THE PETITION

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January 4, 1985

QUESTION PRESENTED

Whether variances in wages which are the result of a sex-neutral seniority system, a sex-neutral merit system and other factors other than sex are permissible under Title VII.

PARTIES

The petitioner is Betty A. Rosen. Ms. Rosen was the plaintiff in the district court and the appellant in the Sixth Circuit.

The respondents are the United Automobile, Aerospace and Agricultural Implement Workers of America, UAW Local 1879, petitioner's local union, and Chrysler Plastic Products Corporation, petitioner's employer. Chrysler and the Union were the defendants in the district court and the appellees in the Sixth Circuit.

Respondent Chrysler, a wholly-owned subsidiary of Chrysler Corporation, filed a disclosure of corporate affiliations and financial interest dated May 25, 1983, with the Sixth Circuit.

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OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Ohio, Western Division, has not been reported and is printed as Appendix A to the petition. The opinion of the United States Court of Appeals for the Sixth Circuit has not been reported and is printed as Appendix B to the petition. The Sixth Circuit's affirmance of the district court's decision is noted under "decisions without published opinions" at 742 F.2d 1457.

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Equal Pay Act of 1963, 29 U.S.C.A. §§206(d)(1) and (2) (herein "Equal Pay Act"), and of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. §§2000e

et seq. (herein "Title VII"), are reproduced in the petition, pp. 7-10.

Some regulations dealing with the Equal Pay Act of 1963, 29 C.F.R. §§800.146 and 800.147 are reproduced in the petition at pp. 10-13.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is incomplete and inaccurate. For this reason, respondent is compelled to set forth a Statement of the Case which presents a full chronological view of relevant facts and events.

Petitioner was hired in 1965 as a color matcher in the Production Department at a Sandusky, Ohio facility owned by the Air Reduction Company (Airco). Gary B. Dunn was hired into the same plant in 1966 and in 1967 was working in

the Styling Department. Chrysler purchased the facility from Airco in August of 1968. Shortly after the sale petitioner transferred into the Styling Department at the plant.

In 1971, Chrysler instituted a formal salary structure for its Sandusky facility salaried employees. Each classification was assigned to a labor grade. For each grade, a minimum, mid-point and maximum pay rate was provided. The structure spelled out a series of progression steps based on time in the classification, moving workers in increments from the minimum through a point slightly below the mid-point of the salary range for the job. From the mid-point on, the increments were no longer automatic and periodic; rather they were based upon merit. The 1971 wage structure was replaced with a substantially

similar, updated, slightly higher paid version in effect from May 14, 1973, through December 9, 1974.

By late 1972, Rosen held a grade 7 Technician-Test and Analysis classification, which she retained throughout 1973. At this time, Dunn and Rosen were performing different duties in different classifications and salary grades, at different pay rates. Their difference in sex had nothing to do with their pay differential. Certain unique graphic arts portions of Dunn's work, however, were thereafter increasingly performed by outside contractors, or otherwise eliminated for business reasons.

On January 2, 1974, the National Labor Relations Board certified the UAW as the collective bargaining representative of a bargaining unit composed of salaried employees at the Sandusky Chrysler

plant. The sex-neutral salary structure discussed above was in effect at this time. Rosen and Dunn became members of the UAW bargaining unit at its inception, and have continued to be represented by Local 1879.

In 1974, the Union negotiated its first collective bargaining agreement with Chrysler for the Sandusky plant salaried employees' bargaining unit. During contract talks, the Union and the Company encountered major difficulties in structuring a regular classification and pay system, because a number of employees had hitherto been misclassified for reasons of historical accident. The Union's reluctance to bargain a wage decrease or classification down-grade for any of its members led it to propose, and the Company to agree, that any employee receiving an improperly high

rate of pay because of misclassification would be "red circled" to avoid pay reduction. Thirteen employees, ten men and three women, were red circled. One of these employees happened to be Gary Dunn. Those workers would be allowed to retain their existing classification, labor grade, and position within the salary progression structure, so long as they remained in the same job. Employees newly entering the job would be correctly classified and paid accordingly.

The complete initial collective bargaining agreement was ratified by vote of the membership after a full explanation of its terms, including the red circling provision. By its terms the contract was effective December 9, 1974 through November 23, 1977.

The newly bargained pay provisions

were similar in form to the predecessor salary structure. There was a salary range for each job based on classification and labor grade. For each labor grade, the employee would start at a minimum, advance by automatic progression (seniority) through several wage increases; and then by performance increases (merit) through additional increases, until he or she reached the maximum of the salary range for classifications in that labor grade. Employees working in the same classification were routinely paid differently based upon the sex-neutral factors of seniority and merit.

To avoid disincentives to employee transfers and promotions and to cushion workers against wage reductions in the event of downgrades caused by workforce cut-backs, the parties bargained for

certain additional, sex-neutral wage retention provisions.

The "lower grade" rate retention provision ensured that an employee transferred to a lower grade would keep his or her same salary if the salary ranges of the old and new classifications overlapped. If the worker's rate in the old classification was higher than the maximum on the new job, the worker's pay would be reduced to the maximum of the new classification's salary range.

The initial collective bargaining agreement also provided for general increases and Cost of Living Adjustment (COLA) fold-ins to be paid in equal flat dollar amounts to all workers on top of their base rates.

Immediately after the collective bargaining agreement went into effect, Rosen was classified as a Technician-

Test and Analysis, a labor grade 7 job, and she was earning $208.35 per week. Dunn was red circled as an Illustrator-Graphic B, labor grade 9, earning $224.26 per week.

During the 1974 agreement, Rosen and Dunn both thereafter received identical dollar amount wage increases as part of general across-the-board or COLA wage increases. In addition, each received merit pay increases.

On September 15, 1975, Rosen filed a grievance protesting that she was underpaid compared to Dunn. While that grievance was pending, she filed charges with the Equal Employment Opportunity Commission (EEOC) against both the Company and the local Union complaining of the pay differential. On January 25, 1979, EEOC issued a Notice of Right to Sue. On August 31, 1976, plaintiff

filed charges with the Ohio Civil Rights Commission against Chrysler and Local 1879, claiming the salary difference was discriminatory; the Ohio agency found no probable cause to believe discrimination had occurred on June 7, 1977.

In 1977, the Company and the Union negotiated their second collective bargaining agreement. This agreement's duration was from December 8, 1977 through November 23, 1980. The new contract continued the classifications, labor grades and corresponding salary range schedule. The red circling agreement to continue previously misclassified workers at their higher classifications, labor grades and pay rates was similarly renewed. However, Dunn, who was then bargaining unit chairperson, voluntarily deleted himself from the list of thirteen workers with

grandfathered classifications and labor grades. He succeeded in bargaining for a classification upgrade for plaintiff. Thus, because of Dunn's and Local 1879's own efforts, as of December 19, 1977, both Rosen and Dunn were reclassified to the newly-created position of Color Specialist - Styling, labor grade 8.

Rosen moved to the merit pay level within labor grade 8. Her wages immediately increased from $266.90 to $273.95. Rosen's new pay was established by applying to her upgrade the contractual provision for promotions.

Dunn's pay rate remained unchanged at $290.83. This was a consequence of the application to his downgrade of the contractual provision protecting workers against wage loss upon demotion. His labor grade 9 rate was lower than the labor grade 8 maximum. He was therefore

placed onto the labor grade 8 salary range at his old labor grade 9 rate, which put him at the merit increase level. Thereafter, Rosen and Dunn received identical general wage increases and COLA.

Again in 1980 the parties negotiated a third collective bargaining agreement, in effect from October 16, 1980 through November 23, 1983. This third agreement again renewed the contractual system of classifications, labor rate retention, and salary ranges. The rate retention, anti-wage loss provision for pay upon promotion, transfer or demotion was likewise maintained in the new collective bargaining agreement.

Assuming subsequent contracts, as in the past, renew the wage and classification structure without relevant changes, within a few years, Dunn will reach the

labor grade 8 maximum. When Dunn reaches the maximum rate, all future automatic or merit increases to Rosen will narrow the gap, until both are at the maximum and are paid equally.

On or about February 16, 1979 petitioner commenced this action by filing a Complaint against her employer, Chrysler Plastic Products Corporation (Chrysler) and her local union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW Local 1879 (Local 1879) in the United States District Court for the Northern District of Ohio, Western Division. In that Complaint petitioner alleged that the wage disparity between herself and Gary Dunn was a denial of equal pay for equal work and constituted unlawful sex discrimination in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e et seq.).

Answers were filed and discovery undertaken. All parties moved for summary judgment. On March 28, 1983 the District Court filed an opinion, order and accompanying judgment denying petitioner's motion and granting respondents'.

The District Court held that the initial wage disparity between petitioner and Gary B. Dunn was due to a factor other than sex, i.e., the undisputed fact that at least until 1973 Gary B. Dunn performed work that was different than petitioner's and which petitioner did not perform. The District Court also held that at all other relevant times, the difference in wages was due to factors other than sex, i.e., the valid sex-neutral collectively bargained provisions to red circle the higher classifications and pay rates for

thirteen improperly classified men and women and to protect all employees against salary reductions in the event of a demotion to a lower graded job.

Petitioner appealed the District Court's decision to the Sixth Circuit. On August 8, 1984, after briefs and oral argument, the Sixth Circuit issued a per curiam opinion adopting the findings and conclusions of the District Court and affirming that judgment.

The instant Petition for Certiorari was served on November 5, 1984.

ARGUMENT - REASONS FOR DENYING THE PETITION

Variances in Wages Which are the Result of a Sex-Neutral Seniority System, a Sex-Neutral Merit System and Other Factors Other Than Sex are Permissible Under Title VII.

Although pled under Title VII of the Civil Rights Act of 1964, this case

involves a "classic" Equal Pay Act type claim of denial of equal pay for substantially equal work. The relevant legal standards for analyzing such an equal pay claim do not differ, regardless of the statutory basis alleged. Odomes v. Nucare, Inc., 653 F.2d 246 (6th Cir. 1981); Strecker v. Grand Forks County Social Service Board, 640 F.2d 96, 99 (8th Cir. 1980) (en banc).

The Bennett Amendment, the last sentence of §703(h) of Title VII, 42 U.S.C. §2000e-2(h) incorporates into Title VII wage discrimination claims the Equal Pay Act four affirmative defenses.

The Bennett Amendment states:

> "It shall not be unlawful unemployment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of Section 206(d) of title 29." 42 U.S.C. §2000e-2(h).

The Equal Pay Act reads in pertinent part:

> "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. §206(d)(1).

The purpose of the Bennett Amendment was to ensure that Title VII and the Equal Pay Act would be mutually consistently interpreted in their area of overlap, i.e., claims of sex discrimination based upon denial of equal pay for equal work. County of

Washington v. Gunther, 452 U.S. at 160, 170, 174 (1981).

The Equal Pay Act exempts wage differentials pursuant to (i) a seniority system; (ii) a merit system; (iii) a piecework or incentive system; or (iv) any other factor than sex. 29 U.S.C. §216(d)(I).

The legislative history in both the House and the Senate establishes the broad scope of the final exception. The Senate noted its intention to permit the use of any non-sex-based wage-setting factor:

> "S. 1409 is designed to eliminate any wage rate differentials which are based on sex. Neither the committee nor anyone proposing equal-pay legislation intends that other factors cannot be used to justify a wage differential. For example, a woman and a man may be doing precisely the same work at adjacent posts, and yet the man may be earning substantially more than the woman, or vice versa, because of

> his or her tenure on the job. Such seniority systems are valid exceptions provided they are based on tenure and not upon sex.
>
> "Similarly, a merit system or piecework system which measures either the quantity or quality of production or performance can result in far greater gross earnings by one person compared to another, even though both are technically doing the same work. Obviously, such systems which measure quantity or quality of production or performance will be valid exceptions to the equal-pay requirements. Without question, employers have other valid classification programs which can justify an exception."
> (Emphasis added).

S. Rep. No. 176, 88th Cong., 1st Sess. 4 (1963).

The House was even more definitive in expressing its intent to make the fourth exemption a catch-all, and it explicitly endorsed "red circling" as one such legitimate factor other than sex.

> "Three specific exceptions and one broad general exception are also

listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded. It also recognizes certain special circumstances, such as "red circle rates." This term is borrowed from War Labor Board parlance and describes certain unusual, higher than normal wage rates which are maintained for many valid reasons. For instance, it is not uncommon for an employer who must reduce help in a skilled job to transfer employees to other less demanding jobs but to continue to pay them a premium rate in order to have them available when they are again needed for their former jobs." (Emphasis added.)

H.R. Rep. No. 309, 88th Cong., 1st Sess. 3, reprinted in [1963] U.S. Code Cong. & Admin. News, 687, 689, also reprinted

in Staff of House Comm. on Education & Labor, Legislative History of the Equal Pay Act of 1963, 88th Cong., 1st Sess. 44 (1963). See, generally, Hodgson v. William and Mary Nursing Hotel, 65 CCH Lab. Cas. ¶32,497 (M.D. Fla. 1971).

The Department of Labor regulations follow this expression of Congressional intent in recognizing bona fide red circling as a legitimate nondiscriminatory reason for a wage differential. 29 C.F.R. §§800.146, 800.147. Courts have recognized that the red circle principle "has yet to be defined in all its manifestations; the flexibility of the concept has been preserved by anticipation of the particular needs that may arise in attempting to reconcile legitimate business necessities with the dictates of the Act..." Marshall v. J.L.

Hudson Co., 25 FEP Cases 1101 (E.D. Mich. 1979).

The wage differential between Dunn and Rosen was caused by the routine operation of certain portions of the collective bargaining agreement: the standard salary/classification structure and the special provision red circling thirteen employees' pre-existing classifications and pay rates in the initial labor agreement. The salary structure causes pay differentials among workers holding the same classification based upon time in the job and merit. The automatic progression portion of the schedule is a seniority-based differential; the merit increase portion constitutes a merit system. The combined system is exempted under the first and second Equal Pay Act affirmative defenses. See, e.g., Strecker v. Grand Forks County Social

Service Board, 640 F.2d 96 (8th Cir. 1980); EEOC v. Aetna Ins. Co., 616 F.2d 719, 725-726 (4th Cir. 1980); EEOC v. Cleveland State University, 28 FEP Cases 1782, 29 EPD ¶32,783 (N.D. Ohio 1982); Noles v. Concord Lace Corp., 25 FEP Cases 367, 370 (M.D.N.C. 1980).

In the 1974 agreement, the red circling agreement also contributed to plaintiff's wage disparity. It preserved Dunn's higher classification, labor grade, and position on the salary structure. The same agreement also preserved the higher classifications and corresponding salaries of twelve other men and women. The purpose of the red circling agreement was to protect these thirteen men and women from bearing the brunt of a correction in mis-classification, such mis-classification being not the fault of error of any of

the individual men and women. Such a red circling agreement, whose purpose is not to discriminate or to insulate prior discrimination from judicial scrutiny, is a valid factor other than sex within the scope of the fourth exemption. See, e.g., Mangiapane v. Adams, 20 FEP Cases 699, 19 EPD ¶9,030 (D. D.C. 1979), aff'd, 24 EPD ¶31,277 (D.C. Cir. 1980); Salazar v. Marathon Oil Co., 502 F. Supp. 631 (S.D. Tex. 1980); Noles v. Concord Lace Corp., 25 FEP Cases 367 (M.D.N.C. 1980); Hodgson v. Lenkurt Electric Co., 5 EPD ¶8,106 (N.D. Cal. 1973).

In 1977 contract talks, Dunn voluntarily relinquished his red circled status at labor grade nine, in return for Chrysler's agreement to reclassify Rosen, as well as himself, in a newly-created labor grade 8 position. This

increased Rosen's potential for future pay increases, while decreasing Dunn's own. At the point where the new collective bargaining agreement became effective, the red circling agreement ceased to be a cause of the salary differences between Dunn and Rosen. Rosen was treated as having received a promotion, and was paid according to the contractual provisions for promotions to a higher labor grade. She was placed on her new labor grade 8 progression, one step higher than her prior pay rate on labor grade 7. Dunn was treated as a contractual demotion, and his pay step was determined in accordance with the provision which protects all workers regardless of sex from pay loss upon demotion.

This wage retention provision may be regarded as a variant of red circling,

see, Noles v. Concord Lace Corp., 25 FEP Cases at 368; Hodgson v. Lenkurt Electric Co., supra; or it may be viewed as an integral part of the salary system, and a factor other than sex. Either way, it falls within the fourth exemption.

Each of these contractual provisions, separately and in their cumulative operation, are sex-neutral, applied uniformly to the entire bargaining unit, without regard to sex. They were not negotiated or applied with the intent to discriminate on the basis of sex or otherwise, but for legitimate business and union reasons. None was negotiated as a proxy for the sex of the affected workers, or as a pretext to perpetuate prior sex discrimination. Each of the several factors contributing to the salary differences between Rosen and

Dunn is a legitimate, non-discriminatory basis for different pay.

Petitioner does not dispute that the wage differential between Dunn and her was caused by their initially different jobs and classifications, the subsequent red circling of Dunn's position, the routine application of the automatic and merit progression system, and the normal protection accorded Dunn's wage rate when he voluntarily accepted a down-grade. Nor does Rosen challenge the legal proposition that the automatic progression/merit system is protected as a bona fide merit/seniority system under the first and second affirmative defenses. Rather, petitioner claims that:

> "[t]he purpose and limits of 'red-circling' need clarification to prevent a misapplication of the concept so severe as to cause a permanent perpetuation of prior discrimination in the payment of wages." (Petition at 21).

As previously stated, it is undisputed that the initial disparity in wages was due to the fact that Dunn and petitioner were performing different work. Thus, there is no "prior discrimination" in this case. Secondly, the red circling agreement ceased to be a cause of salary disparity in 1977 when Dunn voluntarily took a demotion to a lower graded position and persuaded Chrysler to upgrade petitioner to that position. From that point on any disparity would be the result of the sex-neutral automatic and merit progression wage system applicable to all employees and the sex-neutral lower grade wage protection provisions which also apply to all employees. The purposefully broad language of the statute, the legislative history, the regulations and the case law all preserve the broad and general defense of "any other factor other than sex" and

specifically acknowledge that red circling is a flexible concept that can be implemented for many valid reasons. Case law also demonstrates that courts have no difficulty in striking down red circling agreements which are a subterfuge for sex discrimination. The factual predicate of those cases is strikingly absent here. The record shows, without dispute, a history of different pay between Rosen and Dunn attributable to his performing different duties in a different classification. Over time, Dunn's duties altered, until gradually they came to equal Rosen's. Dunn's different pay rate did not stem from a history of classifying women and men workers in the Sandusky plant differently and underpaying the women who did the same work as the men. Indeed the record specifically negatives any such fact pattern, the facts show that

at all relevant times some women made more than some men for performing work in the same classification due to operation of the sex-neutral salary progression system. Further, no discriminatory purpose for the red circling has been shown. All witnesses to the initial bargaining attested that the objective of the red circling provision was to avoid reducing the wages of thirteen men and women who had been improperly overclassified for reasons unrelated to sex. Nor has petitioner shown or even alleged discriminatory application of the red circling provisions. No female employees similarly misclassified were excluded from the red circling and no men were included among the red circled employees who should not have been.

Petitioner has had an opportunity to litigate her claims in the District Court and in the Sixth Circuit Court of

Appeals. On the facts and the law both courts determined that there was no unlawful discrimination because of sex as to petitioner. Petitioner has failed to even suggest a basis for error in the decisions below. It is clear that further review by this Court is neither warranted nor appropriate.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be declined.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Brief in Opposition to the Petition were served upon each of the parties in the foregoing cause, by sending same by ordinary U.S. Mail, with postage prepaid, on this 4th day of January, 1985, addressed as follows:

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